U.S. Department of Labor

Office of Administrative Law Judges
50 Fremont Street - Suite 2100
San Francisco, CA 94105

(415) 744-6577
(415) 744-6569 (FAX)

Issue Date: 24 January 2003

CASE NOS.: 2001–LHC-03166
2001-LHC-03167

OWCP NOS.: 14-134196
14-134988

In the Matter of:

CLAIRE WEIBLE,
Claimant,

v.

UNITED STATES NAVY EXCHANGE,
Self-Insured Employer,

and

CRAWFORD & COMPANY,
Administrator.

Appearances:

John W. Schedler, Esq.,
Law Office of John W. Schedler,
For the Claimant

Russell A. Metz, Esq.,
Metz & Associates P.S.
For the Employer and Administrator

Before Donald B. Jarvis,
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This case arises under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq*. (the "Act"), as extended by the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.*[1] Claimant Claire Weible ("Claimant") seeks compensation for neck and lumbar injuries allegedly sustained in the course and scope of her employment as a visual merchandiser at the United States Navy Exchange (the "Exchange" or "Employer"). Claimant's Exhibits 1 through 27, and Employer's Exhibits 1 through 11, were admitted into evidence at the formal hearing held May 15, 2002, in Seattle, Washington. Tr 14, 77.

I. Facts

Claimant, born July 31, 1954, a high school graduate with two years of junior college education and an employment history in retail, began working for the Exchange in November 1987 as a visual merchandiser. Ex 8 at 104, 115; Tr 17. Claimant's responsibilities as a visual merchandiser included creating, constructing, and maintaining signs, as well as decorating ledges and shelves. Ex 8 at 118. The position also entailed climbing ladders and lifting objects weighing up to fifty pounds.[2] *Id*. Claimant was hired part-time and usually worked 35 hours a week. Tr 20.

According to Claimant, when she began her employment with the Exchange she had a "healthy lifestyle" with no significant lumbar or cervical impairments. Tr 42-44. In January 1991, however, Claimant suffered an injury to her back while pushing a heavy cart of merchandise at the Exchange. Ex 7 at 98. Claimant sought treatment from a chiropractor, Patricia Wasson, who diagnosed a "[p]ossible L5 inflammation," lumbar strain, C2 subluxation, and "[c]hronic mild to moderate, periodic lumbar pain due to pre-existing lumbar condition." Cx 2 at 3. This injury was followed by a series of injuries in subsequent years—including the injuries at issue occurring in October 2000 and January 2001—with each injury in turn exacerbating the harm caused by previous injuries.

On October 4, 2000, Claimant lifted and pushed heavy boxes of sweaters in addition to completing her sign-making responsibilities. Cx 15 at 22; Ex 4 at 94; Tr 35. Claimant did not have any immediate pain, nor did she report any pain later that evening when she departed on a pre-scheduled flight from Oak Harbor, Washington to St. Louis, Missouri to visit her family. Tr 36. The following day, however, Claimant experienced "terrible" pain in her lower back, and

[1]References to the hearing transcript are indicated by "Tr;" Claimant's exhibits at the hearing are indicated by "Cx;" and Employer's exhibits submitted at the hearing are indicated by "Ex."

[2]According to Claimant's testimony, the requirement of lifting up to 50 pounds was not a part of the original job description of a visual merchandiser. Tr 97.

on October 6, 2000, had "severe" and "excruciating" pain for which she sought treatment with a chiropractor, Katherine Conable, in St. Louis. Cx 15 at 22; Ex 3 at 92; Tr 36, 88. Claimant reported that the injury's onset occurred "Friday 10/6/00 lifting and luggage," and that she had "re-injured previous lumbar strain."[3] Ex 3 at 92. Dr. Conable examined Claimant on October 9, 2000, and diagnosed a sprain lumbosacral, lumbar subluxation, and lumbago. Cx 25 at 48. Dr. Conable performed spinal adjustments and recommended bedrest, icing and anti-inflammatories. *Id.*; Cx 15 at 22.

After Claimant returned from St. Louis, Missouri, Claimant's chiropractor, Patricia Wasson, examined her on October 17, 2000. Cx 15 at 22. Claimant reported "increased severe low back pain," and Wasson recommended that Claimant not return to work that week, due to "the severity of her symptoms and history of lumbar instability." *Id.* Wasson again examined Claimant on October 27, 2000, releasing Claimant to work two to four hours per day to her pain tolerance, and Claimant subsequently returned to modified work on October 30, 2000. *Id.*

On January 29, 2001, while changing a message on a reader board—a type of sign with changeable or removable lettering—Claimant experienced "discomfort." Ex 1 at 1; Tr 40. According to Claimant, she climbed the reader board by hoisting herself onto it. Tr 40. The following day, Claimant "noticed a tightening" in her back, and two days later, she called Dr. Wasson and reported that she experienced increased low back pain one hour after leaning slightly forward for an eye exam over the weekend of February 3, 2001. Cx 18 at 30. Dr. Wasson examined Claimant on February 5, 2001, and concluded on a "more probable than not basis" that Claimant's "hoisting herself up onto a platform" exacerbated Claimant's low back. Cx 18 at 31. Dr. Wasson described Claimant's status as "Chronic low back pain, degenerative lower lumbar disc inflammation improving from 1-29-01 aggravation of pulling herself up on a platform...Cervical and Thoracic spine ongoing aggravation and inflammatory process, cervical segmental dysfunction due to 2-22-00 injury at work." *Id.* Dr. Wasson released Claimant to work for 1 to 4 hours per day to her pain tolerance with a permanent lifting restriction of 25 pounds or less.[4] *Id.*

On February 15, 2001, Dr. Hanesworth, who was referred by Dr. Wasson to examine Claimant and evaluate surgical options, assessed "[c]hronic lumbar back pain with evidence of degeneration at the lowest two lumbar levels." Ex 6 at 96. After reviewing Claimant's

---

[3]According to Claimant's testimony, although her description of the cause of her pain, lifting luggage, was seemingly accurate at the time, she later realized that she "was wrong." Tr 90. She testified that in fact she had a "rolling carry-on," which was checked in by the flight attendant. *Id.* Because in the history of her injury "the pain comes later," Claimant testified that she did not realize at the time of her examination that the injury was work-related. Tr 90-91.

[4]The lifting and limited work hour restriction had been in place since July 1999. Cx 19 at 32.

radiographs, Dr. Hanesworth concluded that Claimant "does seen [sic] to have some moderate degeneration at what is either the 4-5 or 5-6 level and again at either the 5-1 or 6-1 level," but there was no "obvious evidence of instability." *Id*. Dr. Hanesworth did not recommend any further evaluation or therapy, nor did he consider an MRI scan "helpful at this point." Ex 6 at 97. He noted, however, that if Claimant was not able to "live with her normal routine," then at that point, "she should be further evaluated with a MRI scan and discograms." *Id.* Claimant agreed to see Dr. Hanesworth on an as needed basis. *Id.*

Claimant returned to work on February 20, 2001, for 2 hours per day and on April 10, 2001 Dr. Wasson released her to work, maintaining the permanent lifting and 6 hour daily work restriction. Cx 19 at 32; Ex 2 at 86.

On April 16, 2001, K. Robert Lang, M.D., an orthopedic surgeon, performed an independent medical evaluation. Ex 7 at 98. Claimant complained of low back pain with "intermittent but persistent recurrence." Ex 7 at 98, 100. Dr. Lang reviewed Claimant's X-rays dated February 15, 2001 of her cervical and lumbar spine, finding that the cervical spine "looks entirely normal without evidence of disk degeneration," and that the lumbar spine "shows significant persistent narrowing at L4,5 and L5,S1 without pars defect, and no other significant abnormalities." Ex 7 at 102. Dr. Lang diagnosed a "[l]umbar strain imposed on degenerative disk disease," in addition to "[e]xogenous obesity" and "[g]eneral deconditioning." *Id*. Dr. Lang opined, on a more probable than not basis, that the lumbar strain was "related to the multiple industrial injuries," but also found that Claimant's condition did not "seem related to preexisting problems." *Id.* Dr. Lang also concluded that Claimant's state was "fixed and stable," but "[did] not see any ratable impairment as the result of this condition." Ex 7 at 103.

Subsequently, Claimant received correspondence dated August 20, 2001 from D.P. Ruiz, General Manager at the Navy Exchange, regarding Claimant's inability to perform at the position of visual merchandiser and the Exchange's offering to Claimant of the cashier checker position. Ex 5 at 95. In the letter, the Exchange allowed Claimant the option of either accepting the cashier checker position or declining it, in which case Claimant's employment with the Exchange would be terminated for "extended disability." *Id.* Previously, in a July 2, 2001 letter to the Exchange, Dr. Wasson had stated that the duties and requirements of cashier checker—including long term standing and lifting over 25 pounds—would "likely aggravate her low back." Cx 20 at 33. After re-evaluating Claimant on August 21, 2001, Dr. Hanesworth concurred with Dr. Wasson, stating that "the position as a cashier which would require long periods of standing, twisting, and lifting from a somewhat bent over position away from her body would be one of the worst jobs she could have with a chronic back condition." Cx 22 at 37.

Claimant declined the position of cashier checker, and on October 11, 2001, the Exchange terminated Claimant's employment. Cx 24 at 42. At Claimant's Counsel's request, Merrill A. Cohen, M.C., C.D.M.S., C.R.C., C.C.M., performed a vocational evaluation on October 31, 2001. Cx 24 at 40-44. Ms. Cohen reported Claimant as "an articulate and bright woman with well-developed customer service sales, and communication skills," and opined that

she "retains access to a range of employment opportunities." Cx 24 at 43. She cited such employment opportunities as Office Clerk, Dispatcher, Office Assistant, Desk Clerk and General Clerk, with hourly wages ranging from $7.00 to $9.36. *Id*. Additionally, Ms. Cohen noted that the occupation of general office clerk is "among the highest growth occupations in North West Washington (Island, San Juan, Skagit, and Whatcom counties)," with average hourly wages ranging from $8.00 to $12.00. *Id*. Ms. Cohen concluded that these jobs appeared consistent with Claimant's skills, abilities, and physical capacities, taking into consideration Claimant's lifting, bending and twisting restrictions. *Id*. Lastly, Ms. Cohen reported Claimant's residual wage earning capacity between $7.00 and $12.00 per hour on a part time to full time basis. *Id*.

On March 12, 2002, William B. Skilling, M.A., C.D.M.S., C.R.C., performed a vocational evaluation at Employer's request. Ex 8 at 104-124. While Mr. Skilling concurred with Ms. Cohen's identification of job openings consistent with Claimant's skills, abilities and physical capacities, Mr. Skilling disagreed with the wages associated with such positions. Ex 8 at 116. According to Mr. Skilling's labor market research, such suitable, alternate employment—including employment in Snohomish County—would provide Claimant with "wages ranging from $7.00 to $15.00 per hour." *Id*. Mr. Skilling also identified Customer Service Cashier and Merchandiser positions as being available to Claimant. Ex 8 at 119-25.

According to Claimant, she searched for work in the months following her termination from the Exchange, including applying to a number of retail stores in Oak Harbor as well as searching for employment in other cities within Island County. Tr 62-66. At the time of the hearing, Claimant was employed part-time at a retail shop in Coupeville, within Island County, earning $7.00 per hour. Tr 66-67.

II. Discussion

Claimant and Employer do not dispute that Claimant's claim for compensation and medical benefits arises under the Longshore and Harbor Workers' Compensation Act. The parties also agree that at the time of the alleged injuries, an employer-employee relationship existed between Claimant and Employer; that Claimant has suffered an injury; and that the claim was timely noticed and filed. The parties dispute, however, whether Claimant's injuries are causally related to her work activities and the nature and extent of Claimant's disability. Employer, moreover, seeks Special Fund relief pursuant to 33 U.S.C § 908(f), if Claimant is found to have a compensable permanent disability.

In arriving at a decision, the administrative law judge is entitled to determine the credibility of witnesses, to weigh the evidence, and to draw his own inferences from it; furthermore, the administrative law judge is not bound to accept the opinion or theory of any particular medical expert. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467, *reh'g denied*, 391 U.S. 929 (1968); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741, 742 (5th Cir. 1962); *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155 (1985).

A. Section 20(a) Presumption of Coverage

Pursuant to Section 20 of the Act, a claimant's condition is presumed to be causally related to the claimant's employment in the absence of substantial evidence to the contrary. *See Ramey v. Stevedoring Services of Am.*, 134 F.3d 954, 959 (9th Cir. 1998). To invoke the presumption, the "claimant need only show that [he] sustained physical harm and that conditions existed at work which could have caused the harm." *Id.* (quoting *Susoeff v. San Francisco Stevedoring Co.*, 19 BRBS 149, 151 (1986)). Once invoked, the burden of proof shifts to employer to rebut the presumption with substantial countervailing evidence. *Merrill v. Todd Pacific Shipyards Corp.*, 25 BRBS 140, 144 (1991).

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, " and includes a work-related aggravation of a pre-existing condition. 33 U.S.C. § 902(2); *Gardner v. Bath Iron Works Corp.*, 11 BRBS 556 (1979), *aff'd sub nom. Gardner v. Director, OWCP*, 640 F.2d 1385 (1st Cir. 1981). The term "injury" also encompasses the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work related conditions. *Lopez v. Southern Stevedores*, 23 BRBS 295 (1990); *Care v. WMATA*, 21 BRBS 248 (1988). An employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes, but if such injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. *Strachan Shipping v. Nash*, 782 F.2d 513 (5th Cir. 1986); *Independent Stevedore Co. v. O'Leary*, 357 F.2d 812 (9th Cir. 1966); *Kooley v. Marine Indus. Northwest*, 22 BRBS 142 (1989). Lastly, when a claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, the employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 549 (S 1981).

Claimant's credible subjective complaints of symptoms and pain can be sufficient to establish the element of physical harm necessary for a *prima facie* case and the invocation of the Section 20(a) presumption. *See Sylvester v. Bethlehem Steel Corp.*, 14 BRBS 234, 236 (1981), *aff'd sub nom. Sylvester v. Director, OWCP*, 681 F.2d 359 (5th Cir. 1982). A claimant also need not affirmatively establish a connection between work and harm. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

In the instant case, Claimant alleges that her work activities of October 4, 2000 and January 29, 2001 aggravated her prior industrial neck and lumbar injury of January 29, 1991. On both occasions, Claimant sustained physical harm as evidenced by her complaints of pain, whether "terrible," "severe," or "excruciating." That Claimant was diagnosed with various lumbar and cervical strains and subluxations after each incident, coupled with Dr. Wasson's findings that Claimant's work-related activities exacerbated her previous neck and back

condition, also demonstrates that Claimant suffered physical harm, and that working conditions could have caused this harm. Accordingly, because Claimant's neck and lumbar pain could have arisen from her work-related activities of October 23, 2000 and January 29, 2001, I conclude that Claimant is entitled to a presumption that her cervical and lumbar injury is covered under the Act.

Employer contends, however, that Claimant's neck and back pain is not causally related to her work activities of either October 4, 2000 or January 29, 2001, because the onset of Claimant's pain in each instance occurred after the performance of non-work related activities. As aforementioned, the Section 20(a) presumption may be overcome only by substantial countervailing evidence, and such evidence includes a physician's unequivocal statement, to a reasonable degree of medical certainty, that the claimant's injury is not related to his employment. *O'Kelley v. Dep't of the Army/NAF*, 34 BRBS 39, 41-42 (2000).

Here, Employer does not offer any evidence that Claimant's neck and back pain is not related to her employment. Although Claimant did not experience pain until after the performance of work activities—thus the onset of her pain was delayed between one and two days—this alone does not "sever the potential connection between the disability and the work environment." *Parson Corp. v. Director, OWCP*, 619 F.2d 38, 41 (9th Cir. 1980). Claimant's chiropractor observed a pattern of the delayed onset of pain. Claimant's treating physicians and chiropractors also opined that Claimant's neck and back pain resulted from her work-related activities on October 4, 2000 and January 29, 2001, rather than her non-work-related activities of flying, lifting luggage, or sitting for an eye exam. Thus, in the absence of substantial countervailing evidence, Claimant's neck and back injury is presumed to be compensable.

Employer also suggests that when Claimant lifted merchandise on October 4, 2000, she did so without any prompting by her supervisor and in disregard of her medical lifting restrictions. Ex 4 at 93-94. Even if an injury has arisen out of and in the course of employment, it is not compensable if the injury was occasioned by the willful intention of the employee to injure himself. *See* 33 U.S.C. § 903(c); *O'Connor v. Triple A Mach. Shop*, 13 BRBS 473, 476-77 (1981); *Kielczewski v. The Washington Post Co.*, 8 BRBS 428, 431 (1978). Pursuant to Section 20(d) of the Act, however, a claimant has the benefit of the presumption "that the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another." 33 U.S.C. § 920(d). In order to rebut the presumption, employer must present substantial countervailing evidence that claimant willfully intended to injure himself. *See Rogers v. Dalton S.S. Corp.*, 7 BRBS 207, 210 (1977).

Assuming *arguendo* that Claimant here failed to observe her medical lifting restrictions, a claimant's disregard of medical advice, in and of itself, does not establish the "willful intent to injure" oneself required by Section 20(d). *Jackson v. Strachan Shipping Co.*, 32 BRBS 71, 75 (1998). Accordingly, in the absence of substantial countervailing evidence to rebut the Section 20(d) presumption, I find that Claimant's injury is presumed compensable.

B. Nature and Extent of Disability

A disability is the "incapacity because of injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." 33 U.S.C. § 902(10). Compensation for an industrial injury depends on the nature and extent of the disability, both of which must be established by the claimant. 33 U.S.C. § 908(c)(21); *Trask v. Lockheed Shipbuilding & Constr. Co.*, 17 BRBS 56, 59 (1985). When evaluating a disability, the administrative law judge will consider the claimant's age, education, and employment history, as well as the availability of appropriate employment. *American Mut. Ins. Co. v. Jones*, 426 F.2d 1263, 1265 (D.C. Cir. 1970).

At issue here is whether Claimant's lumbar and cervical condition is temporary or permanent. A disability is permanent if the claimant has any residual impairment after reaching maximum medical improvement or if the disability has persisted for a lengthy period of time and appears to be of lasting or indefinite duration. *Watson v. Gulf Stevedores Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), *cert. denied*, 394 U.S. 976 (1969); *Trask*, 17 BRBS at 60.

In evaluating this issue, generally the opinion of the claimant's treating physician is to be accorded greater weight since the physician "is employed to cure and has a greater opportunity to know and observe the patient as an individual." *See Amos v. Director, OWCP*, 153 F.3d 1051, 1054 (9th Cir. 1998), *amended by* 164 F.3d 480 (9th Cir.), *cert. denied sub nom. Sea-Land Serv., Inc. v. Director, OWCP*, 528 U.S. 809 (1999). In the instant case, however, Claimant's treating physician, Dr. Wasson, failed to specify a maximum medical improvement date. Dr. Wasson released Claimant to her restricted work on April 10, 2001, but she did not offer any opinion concerning the likelihood that Claimant's back condition would improve.[5] Cx 19 at 32. Because Dr. Wasson's opinion on the issue is absent from the available records, I am unable to make a determination.

On the other hand, Dr. K. Robert Lang, the examining physician, indicated in his detailed report that Claimant had reached maximum medical improvement. Ex 7 at 98; Ex 10 at 156. Dr. Lang is a board certified orthopedic surgeon, and as such is qualified to render an opinion regarding Claimant's lumbar and cervical condition. On the basis of this medical opinion, I find and conclude that Claimant had reached maximum medical improvement on April 16, 2001—the date on which Dr. Lang rendered his opinion—and that she continues to have residual disability, and this residual disability may be considered permanent.

As to the extent of Claimant's disability, under the Longshore Act a claimant is presumed to be totally disabled where the claimant establishes an inability to return to the claimant's usual

---

[5]The release, in its entirety, stated: "Clare Weible is released to return to working 6 hours per day or less to pain tolerance. She is released to lift no more than 25#. These current restrictions have been in placed [sic] since 7-99 and are to be considered permanent." Cx 19 at 32.

employment. *Manigault v. Stevens Shipping Co.,* 22 BRBS 332, 333 (1989); *Elliot v. C & P Tel. Co.,* 16 BRBS 89, 91 (1984). If the claimant invokes this presumption, the employer may rebut by establishing the availability of suitable alternative employment that the claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038 (5th Cir. 1981). The employer must identify specific positions which are available to the claimant and comport with the claimant's physical restrictions. *Hairston v. Todd Shipyards Corp.,* 849 F.2d 1194, 1196 (9th Cir. 1988); *Bumble Bee Seafoods v. Director, OWCP,* 629 F.2d 1327, 1330 (9th Cir. 1980). Even if the employer succeeds at establishing suitable alternate employment, the claimant may still prevail by showing an inability to secure employment despite a diligent effort. *Palombo v. Director, OWCP,* 937 F.2d 70, 73 (2d Cir. 1991).

To invoke the presumption of total disability, Claimant here need only demonstrate that she is unable to return to her former employment as a visual merchandiser. *Elliot,* 16 BRBS at 89. The Exchange terminated Claimant "for extended disability." Ex 5 at 95. According to Claimant, she "was called into the...store manager's office and presented with a letter that...they were no longer able to accommodate me [Claimant] in a visual merchandising position because of my low back disability." Tr 53. The General Manager of the Exchange in that letter referred to Claimant's inability to perform her duties as a visual merchandiser. Ex 5 at 95. Employer thus acknowledged, if not admitted, that Claimant's disability prevented her from performing the duties required of a visual merchandiser. Accordingly, because Employer denied that Claimant could return to her former employment as a visual merchandiser, I conclude that Claimant is entitled to a presumption of total disability.

Claimant's apparent admission that she could perform the duties of a visual merchandiser is not fatal to the applicability of this presumption, because in determining whether Claimant has demonstrated an inability to return to her usual employment, Claimant's medical restrictions must be compared with the specific requirements of her usual employment. *See Curit v. Bath Iron Works Corp.,* 22 BRBS 100, 103 (1988). "Usual employment" has been interpreted to mean the claimant's regular duties at the time that claimant was injured. *Ramirez v. Vessel Jeannne Lou, Inc.,* 14 BRBS 689 (1982). Here, Claimant's medical restrictions as identified by the various physicians did not comport with her usual work involving lifting, bending, and twisting. While Claimant and her physicians indicated that Claimant could perform the duties of a visual merchandiser, or more specifically, the duties of a sign maker, she could only do so if specific medical restrictions were in place, such as a limitation on bending and twisting. Cx 20 at 33; Cx 22 at 36-37. Accordingly, Claimant continues to be entitled to a presumption of total disability.

That Claimant worked after her injuries does not necessarily preclude a finding of disability. However, there is no evidence to suggest that Claimant's post-injury employment was due solely to the Employer's beneficence, or that Claimant continued her employment through "extraordinary effort," and thus I find that Claimant is not entitled to an award of compensation concurrent with the period when she was working. *See Shoemaker v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 141, 145 (1980). Accordingly, in this case the earliest date that total

disability status commenced is the date of her termination, when Claimant first suffered a total loss in her wage-earning capacity. Thus, Claimant was totally disabled beginning October 11, 2001, the date of her termination from employment. *See, e.g., Palombo,* 937 F.2d at 76 (2nd Cir. 1991) ("It is the worker's inability to earn wages and the absence of alternative work that render him totally disabled, not merely the degree of physical impairment.").

To rebut the presumption of total disability, Employer must present evidence of suitable alternative employment that Claimant is capable of performing. *New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1038 (5th Cir. 1981). To meet this burden, Employer must show the availability of job opportunities within the geographical area in which Claimant was injured or in which Claimant resides, which she can perform given her age, education, work experience and physical restrictions, and for which Claimant can compete and reasonably secure. *Id.* at 1042-43; *Hansen v. Container Stevedoring Co.,* 31 BRBS 155, 159 n.5 (1997). When Employer establishes suitable alternate employment, Claimant's total disability becomes partial. *Palombo,* 937 F.2d at 73.

An Employer can meet its burden of proving suitable alternate employment by offering claimant a job in its facility, so long as the job does not constitute sheltered employment. *Spencer v. Baker Agric. Co.,* 16 BRBS 205 (1984); *Darden v. Newport News Shipbuilding & Dry Dock Co.,* 18 BRBS 224 (1986). In the instant case, Employer offered Claimant the position of Cashier Checker at the Exchange. Ex 5 at 95. According to Claimant, this position entailed obtaining or receiving merchandise, accepting payment, and lifting heavy items, such as dog food, fertilizer, and grass seed, as well as scanning such items. Tr 56-57. Both Dr. Wasson and Dr. Hanesworth agreed that "long term standing, lifting over 25 pounds and handling heavy packages over the counter will likely aggravate" Claimant's back. Ex 8 at 108. Dr. Hanesworth further opined that the cashier position "would be one of the worst jobs she could have with a chronic back condition." Ex 8 at 109. Because Employer's job offer of Cashier Checker was too physically demanding for the Claimant to perform, I find that the position offered by Employer does not constitute suitable alternate employment. *See Perini Corp. v. Heyde,* 306 F.Supp. 1321, 1328 (D.R.I. 1969); *Mason v. Bender Welding & Mach. Co.,* 16 BRBS 307, 309 (1984).

Employer also asserts that at least six jobs were available to Claimant, as identified in the labor market survey performed by William B. Skilling on April 12, 2002. According to Employer, these positions were within Claimant's physical limitations, comported with her educational and vocational background, and were locally available. The first of these positions, Merchandiser in Oak Harbor, Washington, which was then currently open, paid between $8 and $15.00 per hour. Ex 8 at 119. This position entailed travel by car from store to store checking specified merchandise displays, refurbishing and restocking merchandise, and setting up new displays. *Id*. The second position, Customer Service Cashier for a retail catalogue in Oak Harbor, Washington, paid $7.00 per hour to start, with the potential for merit increases. Ex 8 at 120. This position required answering telephones, taking and placing orders with retail stores, and data entry. *Id*. Desired qualifications for the position included the ability to communicate

effectively over the telephone, as well as data entry experience. *Id*. This position was currently filled within the past 90 days of the date of the labor market assessment. Ex 8 at 120. The third position, similar to the first, was Customer Service Cashier, also located in Oak Harbor and paid $6.75 per hour to start. Ex 8 at 121. This position involved working at a check stand, with frequent standing, although a stool was available. *Id.* The labor market survey also identified a fourth and fifth position, Customer Service Cashier, for two printing companies both located in Everett, Washington. Ex 8 at 122-23. The first printing company paid $9.00 to $10.00 per hour, while the second paid between $9.00 and $12.00 depending on qualifications. *Id*. The position at each company required assisting customers with orders and with the copy equipment. *Id.* Lastly, Employer identified another Customer Service Cashier position, located in Oak Harbor, which paid $7.40 per hour and required cash and merchandise handling, occasional lifting of up to 10 pounds, and occasional sitting, walking, and standing. Ex 8 at 124. This position was open as many as eight times per year. *Id.* With the exception of the latter Customer Service Cashier position, each job was open an average number that depended on need. Ex 8 at 119-24. All employers offered full-time positions, and each were willing and able to accommodate Claimant's limitations. Ex 8 at 119-24.

Initially, with respect to the positions of Customer Service Cashier located in Everett, Washington, I find that these jobs are not available within the Claimant's "local community." As aforementioned, an employer must show jobs which are available within the claimant's local community. *See New Orleans (Gulfwide) Stevedores v. Turner,* 661 F.2d 1031, 1042-43, 14 BRBS 156, 164-65 (5th Cir. 1981). A "local community" has been interpreted to mean the community in which the injury occurred, but may also include the area where the claimant resided at the time of injury. *Jameson v. Marine Terminals*, 10 BRBS 194 (1979). In the instant case, Claimant resided and worked for the Exchange in Oak Harbor, Washington. The location of the Customer Service Cashier jobs—Everett, Washington—is over 65 miles in driving distance from Oak Harbor, Washington.[6] Therefore, since Everett, Washington, is not within Claimant's local community, I find that the identified jobs located there do not constitute suitable alternate employment. *See Kilsby v. Diamond M. Drilling Co.*, 6 BRBS 114 (1977), *aff'd sub nom. Diamond M. Drilling Co. v. Marshall*, 577 F.2d 1003, 8 BRBS 658 (5th Cir. 1978) (finding that jobs 65 and 200 miles away are not within the geographical area, even if the employee took such jobs before her injury).

The other identified jobs, Customer Service Cashier and Merchandiser, all comport with Claimant's physical restrictions, employment experience, and educational level. Claimant is restricted to lifting no more than 25 pounds, and no identified position required lifting, where

---

[6]Oak Harbor, Washington is on Whidbey Island, while Everett is on mainland Washington. According to Claimant, the drive between these two cities is an estimated hour and a half. Tr 71. The alternate route, which takes the same amount of time, requires boarding a ferry across the Puget Sound waters and the transportation costs are, according to Claimant, "very expensive."
Id.

lifting was required at all, more than 10 pounds. While Drs. Wasson and Hanesworth opined that lifting, bending, twisting, and long-term standing necessary to perform the Cashier Checker position at the Exchange would be unsuitable for Claimant, the Merchandiser and Customer Service Cashier positions as identified and described by Employer did not require such motions. Neither the Merchandiser nor the Customer Service Cashier jobs required bending, and each job required only occasional walking and standing.[7] Furthermore, the positions were available throughout the year on a full-time and as needed basis, and were located within the geographical area in which Claimant resided at the time of the injury. Although Claimant stated that she had attempted, but was denied, employment with two of the identified potential employers in Oak Harbor, an employer need not actually place the Claimant in suitable alternative employment. *See Turner*, 661 F.2d at 1043, 14 BRBS at 165. Accordingly, I conclude that Employer established the existence of suitable alternate employment on April 12, 2002, thereby rebutting the presumption of total disability.

If Claimant is able to present evidence of her diligence in searching for employment, she may nonetheless still be considered totally disabled. *Palombo v. Director, OWCP*, 937 F.2d 70,73 (2d Cir. 1991). Claimant is not required to apply for the specific jobs identified by Employer, but need only establish that she was reasonably diligent in attempting to secure a job "within the compass of employment opportunities shown by the employer to be reasonably attainable and available." *See Turner*, 661 F.2d at 1043. Claimant bears the burden to prove a diligent search and willingness to work. *Palombo*, 937 F.2d at 73.

According to Claimant, she applied for and was denied various retail positions in Oak Harbor, Coupeville, and Anacortes, and contacted two potential employers provided in the labor market survey, K-Mart and Wal-Mart, but neither hired her. Tr 62-63, 65, 70. Claimant testified that Wal-Mart ended her telephone interview when she answered how many days of work she had missed in her previous job. Tr 63. Claimant ultimately found employment at a small gift shop in Coupeville, Washington, for a varied number of hours receiving $7.00 per hour for her work in merchandising and sales. Tr 67.

Although Claimant testified as to her job search, she failed to offer any corroborating evidence of her account of jobs that she applied for on her own. Claimant failed to provide evidence of the numbers, names, job description or job search protocol to establish due diligence, or at the least evidence of the amount of effort she actually put into the process. Moreover, her testimony regarding Wal-Mart's inquiry into the number of days of work she had missed was discredited by Mr. Skilling. Tr 127-29. Claimant carries the burden on this issue, and I find that overall she has failed to show that she conducted a diligent search for employment. As a result, I conclude that Claimant was partially disabled, beginning April 12, 2002. *Palombo*, 937 F.2d at 77.

---

[7]There is one notable exception. The Customer Service Cashier position at K-Mart required frequent standing, but it was noted that a stool could be made available. Ex 8 at 121.

C. Compensation

Claimant's compensation is based on her average weekly wage, which is calculated using one of the methods described in Section 10. 33 U.S.C. § 910(a)-(d); *Gilliam v. Addison Crane Co.*, 21 BRBS 91 (1987). The average weekly wage should reflect a fair estimate of a claimant's earning power at the time of injury. *Orkney v. General Dynamics Corp.*, 8 BRBS 543 (1978).

Section 10(a) applies where the claimant worked at the longshore occupation, or one similar, "during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a); *Empire United Stevedores v. Gatlin*, 936 F.2d 819, 821 (5th Cir. 1991). Section 10(b) requires a comparison between the average daily wage of a claimant who has not worked a substantial part of the preceding year and that of a similarly situated employee who has. *Gatlin*, 936 F.2d at 821. Both Sections 10(a) and 10(b) "contemplate an employee working full time in the employment in which he was engaged when injured." *Royal H. Allen v. Sea-Land Serv., Inc.*, 5 BRBS 41, 46 (1976). Calculation of average annual earnings must be made pursuant to Section 10(c) if subsections (a) or (b) cannot "reasonably and fairly be applied." 33 U.S.C. § 910(c); *Todd Shipyards Corp. v. Director, OWCP*, 545 F.2d 1176, 1179 (9th Cir. 1976).

In this case, I find that Section 10(a) does not apply. Although Claimant had worked for the Exchange since November 1987, she was employed on a part-time basis, and in the year preceding her 2000 injury worked less than 75% of the year. *See Duncanson-Harrelson Co. v. Director, OWCP*, 686 F.2d 1336 (9th Cir. 1982), *vacated on other grounds*, 462 U.S. 1101 (1983) (upholding application of § 910(c) in lieu of § 910(a) where claimant worked less than 75% of the year). *Compare* Duncanson-Harrelson Co., *with* Matulic v. Director, OWCP, 154 F.3d 1052, 1058 (9th Cir. 1998) (holding that when a claimant works more than 75% of the workdays of the measuring year the presumption that § 910(a) applies is not rebutted). *See also Empire United Stevedores v. Gatlin*, 936 F.2d 819, 822 (5th Cir. 1991).

I also find Section 10(b) inapplicable. Section 10(b) applies to an injured employee who worked in permanent or continuous employment, but did not work for substantially the whole of the year. 33 U.S.C. § 910(b). Looking to the wages of other workers in the same employment situation, Section 10(b) directs that the average weekly wage should be based on the wages of an employee of the same class who worked substantially the whole of the year preceding injury, in the same or similar employment with the same or similar employer. *Id.*; *Gatlin*, 936 F.2d at 821. Because in the instant case the record contains no evidence of a similarly situated employee's job requirements, hours, or wages, I cannot apply Section 10(b).

Under Section 10(c), calculation of the average weekly wage may be based on actual wages, earned closest to the time of the claimant's injury, and this sum should be given due regard in determining a claimant's annual earning capacity. *Hayes v. P. & M. Crane Co.*, 23 BRBS 389, 393 (1990), *vacated on other grounds*, 930 F.2d 424 (5th Cir.), *reh'g denied*, 935 F.2d 1293 (5th Cir. 1991). According to the available wage records, Claimant earned $15,887.13 in the year preceding her October 2000 injury. This figure also includes Claimant's pay raises, and I find that Claimant's annual earning capacity at the time of the injury properly represents her average annual wage. *See Harrison v. Todd Pac. Shipyards Corp.*, 21 BRBS 339, 345 (1988) (holding that average wage calculation should include pay raises).

Section 10(d) provides that the average annual wage divided by 52 weeks produces the average weekly wage. 33 U.S.C. § 910(d). Here, dividing Claimant's average annual wage of $15, 887.13 by 52 weeks produces an average weekly wage of $305.52.

The parties stipulated that Claimant's post-injury wage earning capacity is $280.00. Tr 68-69. Because this figure comports with the average of the wages offered for the positions establishing suitable alternate employment, I find that there exists substantial evidence in support of the stipulation and accordingly accept that Claimant's post-injury wage earning capacity is $280.00. *See Avondale Indus. v. Pulliam*, 137 F.3d 326, 328 (5th Cir. 1998); *Berkstresser v. Washington Metro. Transit Auth.*, 16 BRBS 231, 233 (1984), *rev'd sub nom. on other grounds, Director, OWCP v. Berkstresser*, 921 F.2d 306 (D.C. Cir. 1990).

For total disability, whether temporary or permanent, Claimant is entitled to compensation at the rate of 66 2/3 percent of her average weekly wage. 33 U.S.C. § 908(a)-(b). Accordingly, Claimant should be compensated at the rate of $203.68 per week from October 11, 2001, through March 12, 2002.

For permanent partial disability, Claimant is entitled to compensation at the rate of 66 2/3 percent of the difference between her average weekly wage and her post-injury wage earning capacity. 33 U.S.C. § 908(c)(21). As Claimant's average weekly wage is $305.52 and her post-injury wage earning capacity is $280.00 per week, Claimant is entitled to $17.01 per week, beginning March 12, 2002, and continuing.

D. Entitlement to Medical Expenses

Claimant also contends that Employer is responsible for her past medical expenses due to her neck and back conditions. Under Section 7(a), reasonable and necessary medical expenses incurred since the industrial injury may be assessed against the employer. 33 U.S.C. § 907(a); *Pernell v. Capitol Hill Masonry*, 11 BRBS 532, 539 (1979). Reasonable and necessary medical expenses are those related to and appropriate for the diagnosis and treatment of the industrial injury. 20 C.F.R. § 702.402; *Pardee v. Army & Air Force Exch. Serv.*, 13 BRBS 1130, 1138 (1981).

Claimant seeks $1,059.80 and $125.00 for chiropractic treatment provided by Dr. Wasson and Dr. Conable, respectively. Claimant's Pre-Hearing Statement at 1. Pursuant to Section 702.404 of the Regulations, chiropractors are considered "physicians" for the purpose of medical treatment, yet manual manipulation of the spine to correct a subluxation shown by x-ray or clinical findings is the only compensable chiropractic treatment. 20 C.F.R. § 702.404; *Bang v. Ingalls Shipbuilding, Inc.*, 32 BRBS 183, 185 (1998).

In the instant case, the itemized services performed by Dr. Wasson for which Claimant seeks $467.00 does not include manual manipulation treatment nor any other compensable treatment.[8] Cx 28 at 49. The services for which Claimant seeks $592.80 does include manual manipulation of the spine, but the diagnoses related to these spinal adjustments—"Lumbar strain/sprain" and "Lumbar pain"—do not indicate that they were performed in order to correct a subluxation, but rather to treat a lumbar strain and pain. Cx 28 at 50. Claimant also seeks reimbursement for expenses relating to "Copies/postage," and "Accident Report L&I," which are unrelated to the manual manipulation of Claimant's spine. *Id*. Accordingly, absent any further evidence that the chiropractic treatment comported with Section 702.404, I must deny compensation for the total amount of $1,059.80. *See Bang*, 32 BRBS at 185 (holding that 20 C.F.R.§ 702.404 does not specifically provide for any other treatment performed by chiropractors besides manual manipulation, even if such other treatment is reasonable and necessary).

Claimant also seeks reimbursement for chiropractic treatment provided by Dr. Conable. Dr. Conable diagnosed a lumbar subluxation, based on her examination and Claimant's patient evaluation form, and performed two adjustments to correct it. Cx 27 at 48. Because this treatment conformed with Section 702.404, I find that Claimant is entitled to reimbursement for these expenses, amounting to $125.00.

E. Entitlement to Special Fund Relief

Employer also asserts entitlement to Special Fund relief. Employer's Pre-Hearing Statement at 2; Ex 9 at 125. Employer first submitted an application for such relief on March 8, 2002, subsequent to this case's transfer to the OALJ in August 2001. Ex 9 at 132; District Director's Transmittal Letter at 1. The Director, Office of Workers' Compensation Programs (the Director) opposed Employer's application by raising the Section 8(f)(3) absolute defense in a Pre-Hearing Statement submitted on March 27, 2002.

Pursuant to Section 8(f)(3) of the Act, an application for Special Fund relief must be

---

[8]The itemized services and costs associated therewith are as follows: "Accident Report L&I, $25.00; Exp Prob Focused OV, $81.00; Prob. Focused OV, $71.00; Supmntl L&I Report, $25.00; Consult. Rpt., $200.00; Review of job analysis, $30.00; LI phys. cap. to Emp., $35.00." Cx 27 at 49.

filed with the OWCP prior to the district director's consideration of the claim,[9] and failure to do so shall be "an absolute defense to the special fund's liability..., unless the employer could not have reasonably anticipated the liability of the special fund prior to the issuance of a compensation order." 33 U.S.C. § 908(f)(3). The regulations implementing this Section also provide that a request for Section 8(f) relief should be made as soon as the permanency of a claimant's condition is known or is an issue in dispute, which "could be when benefits are first paid for permanent disability, or at an informal conference held to discuss the permanency of the claimant's condition." 20 C.F.R. § 702.321(b)(1). An application need not be submitted to the district director, however, where "the claimant's condition has not reached maximum medical improvement and no claim for permanency is raised by the date the case is referred to the OALJ..." 20 C.F.R. § 702.321(b)(3). Although pursuant to 20 C.F.R. § 702.321(b)(3) the Director bears the burden of affirmatively raising the absolute defense, when an employer does not file an application with the district director prior to a claim's referral to the OALJ, it is the employer's burden to establish by a preponderance of the evidence that it could not have reasonably anticipated the liability of the Special Fund. *See Farrell v. Norfolk Shipbuilding & Dry Dock Corp.,* 32 BRBS 283, *modifying in pert. part on recon.* 32 BRBS 118 (1998).

The first issue, thus, is whether at any time prior to the referral of the injury claims to the OALJ the Claimant's neck and back condition had reached the point of maximum medical improvement or had become "an issue in dispute." Claimant's Pre-Hearing Statement received by the OWCP on August 7, 2001 placed the permanency of the Claimant's neck and lumbar condition "in issue," as it stated, "Date of maximum medical improvement" and "PTD [permanent partial disability] absent vocational rehab or demonstration of wage earning capacity" as two of the issues to be presented for resolution at the formal hearing. Claimant's Pre-Hearing Statement (Aug. 6, 2001) at 1. Therefore, the Employer was obliged to have filed its 8(f) application prior to the time Claimant's claims were referred to the OALJ in August of 2001. *See Container Stevedoring Co.,* 935 F.2d at 1547 (holding that under the provisions of Section 702.321(b)(1) an application for Special Fund relief should be filed when a claimant formally claims entitlement to permanent disability benefits). *Accord, Cajun Tubing Testors, Inc. v. Hargrave,* 951 F.2d 72, 75 (5th Cir. 1992). Because Employer's application for relief was not filed until March 8, 2002—over 7 months between Claimant's statement of permanency and the filing of Employer's petition—I find that it was not timely filed.

---

[9]A district director may "consider" a claim in various ways, including but not limited to informal discussions by telephone, conferences, written correspondences, or hearings. *See* 20 C.F.R. § 702.311. Although in the instant case the record lacks any evidence from which to ascertain the degree of the district director's review, the Ninth Circuit under a similar set of facts has applied the principle that "[a]bsent evidence that the deputy commissioner [district director] decided to transfer the case to the OALJ before evaluating every aspect of the claim, we will assume that the [district director] did consider every aspect of the claim when deciding whether to transfer it for a formal hearing." *Container Stevedoring Co. v. Director, OWCP,* 935 F.2d 1544, 1548 (9th Cir. 1991) (footnote omitted).

The second issue is whether Employer's failure to timely file should be excused. Although a claimant's condition may be permanent or "in issue" at the time a claim is referred to the OALJ, an employer's failure to file a timely and fully documented application for Section 8(f) relief may be excused "where the employer could not have reasonably anticipated the liability of the special fund prior to the consideration of the claim by the district director." 20 C.F.R. § 702.321(a)(3). As aforementioned, however, Employer bears the burden of proof to establish by a preponderance of the evidence that Special Fund liability could not have been reasonably anticipated.

Although here Employer failed to contend altogether that it could not have reasonably anticipated the liability of the Special Fund, the record indicates that in fact Employer could have reasonably anticipated Special Fund liability. Employer had sufficient information available regarding the permanency of Claimant's condition—evidenced by the various medical reports which were available to Employer—and hence Employer had at hand medical evidence essential to its application for Section 8(f) relief.

For these reasons, I find that Employer has not demonstrated entitlement to the benefit of the statutory exception to the absolute defense. Accordingly, Employer's application for relief under Section 8(f) must be denied, and hence I need not and do not reach the merits of Employer's Section 8(f) petition.

ORDER

It is ordered that:

1. Employer shall pay Claimant permanent total disability compensation of $203.68 per week from October 11, 2001, through March 12, 2002.

2. Employer shall pay Claimant permanent partial disability compensation of $17.01 per week, beginning March 12, 2002, and continuing.

3. Employer shall pay $125.00 for the services of Katharine Conable, D.C.

4. Employer's application for Special Fund relief is denied.

5. Interest at the rate specified in 28 U.S.C. § 1961 in effect when this Decision and Order is filed with the Office of the District Director shall be paid on all accrued benefits computed from the date each payment was originally due to be paid.

6. All calculations necessary for payment of this award shall be made by the District Director.

7. (a) Claimant's counsel shall file a petition for the allowance of fees and

costs within 20 days after the filing of the within Decision and Order. Such submission shall be on a line item basis and shall separately itemize the time billed for each service rendered. Each such item shall be separately numbered.

(b) All objections to Claimant's counsel's said petition shall be on a line item basis using Claimant's counsel's numbering system, and shall be filed by Employer within 10 days after receipt thereof. Any item not objected to in such manner and within such time will be deemed acquiesced in by Employer.

(c) Within 10 days after receipt of any such objection(s), Claimant's counsel may file a response thereto. Such submission shall be on a line item basis following the same numbering system. Any objection not responded to in such manner and within such time will be deemed acquiesced in by Claimant's counsel.

(d) No further submission will be considered unless expressly authorized by the undersigned.

A

DONALD B. JARVIS
Administrative Law Judge